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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986
No

BRIAN L. NICELY
PETITIONER

v.

UNITED STATES STEEL CORPORATION and
UNITED STEELWORKERS OF AMERICA
a Labor Organization
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OUESTIONS PRESENTED FOR REVIEW

1. Whether a genuine issue of material fact exists in the record with respect to the date upon which the statute of limitations began to run, which if decided by a trier of fact, would enable the Petitioner to proceed with his Hybrid Action for Breach of Contract and Breach of the Duty of Fair Representation under Del Costello?

2. Whether a Petitioner in a Hybrid Action for Breach of Contract and Breach of the Duty of Fair Representation is entitled to a properly demanded Trial by Jury?

3. Whether the Third Circuit Court and District Court erred and abused their discretion by resolving factual issues, by assuming conclusions of fact, and by granting Summary Judgment in favor of the moving parties and in contradiction to voluminous United States Supreme Court decisions and related law? Also, was the denial of the

Motion for Reconsideration by the lower Courts proper in light of the facts in this case?

4. Whether a genuine issue of material fact exists in the record concerning the proper standard of good faith to be applied by the courts in a Hybrid Action for Breach of Contract and Breach of the Duty of Fair Representation, and did the lower courts err in applying the rigid bad faith rule, instead of the expanded rule of arbitrary, perfunctory, discriminatory, and negligent performance of basic ministerial duties?

5. Whether there exists in the record a genuine issue of material fact with respect to the failure on the part of the Defendants to comply with properly served discovery requests, and whether the Defendant's pleadings at the lower courts were improper and substantially unjust to the Petitioner in violation of the Federal Rules of Civil

Procedure- rules 8(f) and 9(b)?

6. Whether the union was a party to Breach of Contract when the applied contract language included the Union as an active participant, and thereby triggered the Breach of Contract?

The Petitioner reserves the right to raise and poise any further questions, considered proper by the Supreme Court, that were raised in any of the proceedings in the lower courts. All questions herein were raised at the Third Circuit Court of Appeals and/or at the Federal District Court for the Western District of Pennsylvania by the Petitioner in the form of Briefs or Motions before those Courts.

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II. When a Trial by Jury is properly demanded in a hybrid Breach of Contract and Breach of the Duty of Fair Representation suit, it should be granted. -13-

III. The Third Circuit and District Court abused discretion by resolving factual differences and asuming conclusions of fact, without benefit of a trial, in favor of the moving parties, by Granting the Defendants Summary Judgement in contradiction to voluminious U.S. Supreme Court and Circuit Court decisions. Also denial of the Motion for Reconsideration added to the injustice done to the Petitioner. -16-

IV. The Third Circuit Court and the Federal District Courts in Third Circuit apply the most rigid rules in Breach of Contract/DFR suits. This Court must determine what the standard is for Breach of the Duty of Fair Representation (DFR) with no ambiguity to cause confusion or conflict between the Circuits. -20-

V. There exists in the record a genuine issue of material fact with respect to the failure on the part of the Defendants to comply with properly served discovery requests; also, the Defendant's pleadings at the lower courts were improper and substantially unjust to the Petitioner in violation of the Federal Rules of Civil Procedure rules 8(f) and 9(b). -22-

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TABLE OF CASES AND AUTHORITIES

1. Adickes v. S.H. Kress & Co., 398 US 144 (1970).....18

2. Amal Assn. of St.Elec Rway and Mtr.Coach Employees v. Lockridge, 403 US 274 (1971).....21

3. Archer v.Airline Pilots Assn. Intern, 609 F2d 934 (9th Cir 1979).....12

4. Atwood v. Pacific Maritime Assn., 432 F. Supp 491 (D. Oregon 1977), aff'd 659 F.2d 1055 (9th Cir 1981).....15

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8. Butler v. Local Union 823, 514 F.2d 442 (8th Cir 1975).....15

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11. Curtis v. Loether, 415 US 189 (1974)..13

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16. Free v. Bland, 396 US 663 (1962).....18

17. Gray v. Insulators Local 51, 416 F.2d 313 (6th Cir 1969).....15

18. Harrison v. Chrysler, 558 F.2d 1273 (7th Cir 1977).....15

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20. Humphrey v. Moore, 375 US 335 (1964)..21

21. Lawson v. Truck Drivers LU, 100 698 F.2d 250 (6th Cir 983), reh & reh en banc den. (1983), cert. den., 464 U.S. 992 (1983).....12

22. Lincoln v. District 19 IAMAW, 723 F.2d 627 (8th Cir 1983).....12

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29. Parker v. Federal Sat. Mortg. Assc., 19 741 F.2d 975 (7th Cir 1984).....

30. Perez v. Dana Corp., 718 F.2d 581 (3rd Cir 1983).....12

31. Pernell v. Southall Realty
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32. Poller v. CBS Inc., 368 US 464 (1962).18

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34. Quinn v. DiGiulian, 739 F.2d 637
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35. Ross v. Bernhard, 396 US 531 (1970)...13, 14

36. Sanford v. O'Neill, 616 F.2d 92
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37. Santos v. United Bhd. of Carpenters,
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38. Smith v. Hussman Refrig Co.,
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40. USS v. USWA 25 LAR 623 (Labor
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41. Vaca v. Sipes, 386 US 171 (1967).....21

MISCELLANEOUS REFERENCES

42. FAIR REPRESENTATION, THE NLRB, and THE
COURTS (Revised Edition) By Timothy J.
Boyce and Ronald Turner - pg. PASSIM
(This reference book was not specif-
ically cited, but used and referred to
for many of the cases and analysis).

43. FEDERAL RULES OF CIVIL PROCEDURE
Title 28 Sect 2072, Rule 8 (f), 9(b),
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44. WEST FEDERAL PRACTICE GUIDE 2nd and 3rd Series -19-

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BRIAN L. NICELY

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UNITED STATES STEEL CORPORATION and

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RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE THIRD CIRCUIT

The Petitioner, Brian L. Nicely, Pro Se, respectfully prays that a Writ of Certiorori be issued to review the judgments of the United States Court of Appeals for the Third Circuit entered on February 5, 1987 (Appendix A) and the Order of the Federal District Court for the Western District of Pennsylvania entered on August 6, 1984 Order Striking Trial by Jury, Appendix B, Dec. 19, 1984 (2 orders granting Summary Judgment, Appendix C1, C2 and

January 9, 1985 Order Denying Motion for Reconsideration, Appendix D).

OPINION BELOW

The Petitioner does not believe any opinions were rendered by the Third Circuit Court of Appeals or the Federal District Court with the possible exception of the Order to Strike the Plaintiff's Demand for Trial by Jury. (Appendix B).

Since the Third Circuit Court and District Court rendered no opinions, the Petitioner has had to base his Appeal to the Third Circuit, and this Petition for Writ of Certiorari on surmises as to the rationale and decisions of the lower courts.

The Petitioner does not know precisely what to argue against and is therefore left to present every contention raised in order to insure nothing is missed. A copy of the Judgment Order from the Third Circuit Court is attached as Appendix A. No request for rehearing was submitted. A copy of the Orders

from the District Court are attached as Appendix B, C, D, Order Striking Jury Trial - B. Order Granting Summary Judgment C1, C2, Order denying Motion for Reconsideration D. The District Court Orders only have Court cases cited on them which the Petitioner surmises is meant to take the place of any opinions. As far as the Petitioner knows, none of the actions in the lower courts have been reported in any of the Reporters.

JURISDICTION

On February 5, 1987, the Third Circuit Court of Appeals entered judgment (Appendix A) affirming the District Courts Order Striking a demand for Jury Trial (Appendix B), Granting the Defendants Summary Judgment (Appendix C1, C2) and denying a Motion for Reconsideration (Appendix D). (Appendix A, B, C, D). The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254 (1). No other Petitioner is involved in this Petition.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VII (7)

In suits at Common Law, where the value in controversy shall exceed twenty dollars the right of Trial by Jury shall be preserved and no fact tried by Jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the Common Law.

STATUES INVOLVED

1. 28 USC 1291
2. 28 USC 1337
3. 28 USC 2072 FRCP Rules 8 (f), 9 (b), 15, 16, 26 (c2), 34, 38 (a,b,c,d), 39, 42, 56, 59, 60, 81 (c)
4. 29 USC 151 et seq.
5. 29 USC 159, 159 (a)
6. 29 USC 160 (b)
7. 29 USC 185

See Appendix for Statues involved Appended at

F1 thru F12 pg. 10a thru 21a.

STATEMENT OF THE CASE

The Petitioner is an employee of USX Corp (formerly US Steel Corp.) and a member in good standing of the United Steelworkers of America (USWA). The Petitioner was and is a Grievance Committeeman in the USWA's Local 1219 affiliate office and serving approximately eight years.

In June of 1982, the Petitioner was laid off from his Trade and Craft Welder position while junior service Welders were retained. Subsequent to the June 1982 layoff, junior service welders were recalled before the Petitioner. The Petitioner has filed or attempted to file improper layoff and recall claims and grievances on every occasion after the above events occurred.

In June 1982 the Petitioner lost an election for Grievance Committeeman by one vote . That election result is presently in litigation at the Federal District Court for

the Western District of Pennsylvania.

The Petitioner filed a grievance numbered EET 82-49 about his initial layoff on June 28, 1982 and an improper layoff form with USS on June 28, 1982. After numerous meetings and processing through steps of the grievance procedure, the Union withdrew the grievance from Arbitration on May 26, 1983 by the USWA District 15 Staff Representative, Ernest Clifford. This was done subsequent to numerous deliberate acts of impropriety relative to the handling of the Petitioner's grievance EET 82-49. The withdrawal from the Board of Arbitration by the Union on May 26, 1983 constituted the last act of finality and consequence by the Union.

On November 1, 1983, a complaint was filed in the Federal District Court by the Petitioner through his Attorney, James Perich, Esq., a Trial by Jury was demanded. On November 4, 1983, Return of Service of Summons was filed. Well within the 29 USC 160 (b) six month statute of limitations.

On August 6, 1984, the District Court ordered that Petitioner's timely demand for a Trial by Jury be striken and the case tried non-Jury. The case was never tried at all. See Appendix B.

On October 9, 1984, a Pre-Trial Conference was held setting dates for Motions For Summary Judgment and responses to such Motions to be submitted to the District Court. Other Motions are mentioned and the non-Jury Trial date tentatively set for January 7, 1985. No Trial of any type occured. Motions for Summary Judgment were submitted by the Defendants. The Petitioner's Responsive Motion in opposition, raising many issues of material fact was submitted to the Court. (See Appendix G). The Defendants submitted Reply Briefs to the Plaintiff's Response to the Defendants Motion for Summary Judgment. See Appendix H, H2. These Reply Briefs raise the 29 USC 160 (b) six months statute of limitations for the first time. It also can be noted that Appendix H1 of Defendant US

Steel inadvertently acknowledges that issues of material fact do indeed exist.

Summary Judgment was granted to the Defendants on December 19, 1984 without any trial at all. See Appendix C1, C2. A motion for Reconsideration was filed (See Appendix I.) The Motion for Reconsideration was ordered Denied on January 9, 1985. See Appendix D.

Appeal to the Third Circuit Court was taken on February 2, 1985. After numerous problems with the records, numerous extensions of time, and numerous motions were filed, the Petitioner acting Pro Se before the Third Circuit Court, submitted his first Brief and Appendix on September 28, 1985. On February 4, 1986, the Third Circuit Court acting on Deft. USWA's Motion to Dismiss/Strike, ordered the Appellant's Brief and Appendix striken. On May 15, 1986, after more motions to correct the records were filed, the Appellant filed his Brief, Appendix, and Addendum thereto with the Third Circuit. The Defendant USWA again submitted Motions to strike. All the contested

material was referred to the Merits Panel for consideration. Responsive and Reply Briefs were filed.

On February 4, 1987, the case for the Third Circuit 85-3081 (Civil No. 83-2750 WD Pa. Pgh) was submitted to a panel of Circuit Judges. One day later, on February 5, 1987, a Judgment Order from the Third Circuit Court affirming the District Court's Orders was rendered. No opinion was given by the Third Circuit Court. (See Appendix A).

REASONS FOR GRANTING THE WRIT-
THE QUESTIONS ARE SUBSTANTIAL

I.

The six months statute of limitations as applied by the District Court and the Third Circuit Court serves to shorten the six month time limit and is in conflict with this Court and other Circuit Courts. When the time period begins to run on the six months statute of limitations is an issue of material fact to be tried by a Jury and exactly when the time

period begins needs to be determined by this Court, when possible, to avoid conflicts between the Circuit Courts and lower Courts.

In the Petitioner's case at the District and Third Circuit Courts, the lower courts granted and affirmed Summary Judgment. The Petitioner surmises that this was done based on Del Costello v. International Brotherhood. of Teamsters, 462 US 151 (1983) six month statute of limitations rule. As the Petitioner's case was presented he would be caught between two legal precepts in labor law cases with no apparent remedy left to him. If this is left to stand, many Plaintiffs in labor law suits will have the time limits to file shortened or be deprived of any legal remedy. Those precepts are as follows and is what has happened in the Petitioner's case. The Petitioner's case, if it had been filed as the Defendant's have claimed it should, would have been dismissed for Failure to Exhaust Internal Remedies, see Clayton v. UAW, 451 US 679 (1981). Since the Petitioner waited until

the Union had finished acting on the case and committed the last act of any consequence and finality, the Defendants claim he is now beyond the Statute of Limitations set out in Del Costello. The Petitioner does not believe this court intended, by its Del Costello and Clayton rulings to place any employee suing to enforce his rights in a no win situation where he would have his case dismissed and Summa. Judgment granted against him for either Failure to Exhaust Internal Remedies or lack of timely process under Sect. 10(b) of the NLRB Act.

This Court can set the guidelines for the Statute of Limitations based on the last act of finality and consequence taken by the Union during grievance handling, as the point at which the six months time period begins to run. It is suggested to this Court that this approach needs to be reviewed and ruled upon to eliminate much of the ambiguity that now exists in Labor/Grievance Suits.

Decisions from the various Circuits seem to

indicate more than a little confusion, conflict, or at least no set standard that they all follow. This can be seen in the following cases, although some have a common ground they seem to follow such as the last act of finality. See cases: Del Costello, 462 US 151 at footnote 16; Metz v. Tootsie Roll Ind., 715 F.2d 299 (7th Cir 1983); Archer v. Airline Pilots Assn. Intern., 609 F.2d 934 (9th Cir 1979); Lincoln v. District 9, I.A.M.A.W., 723 F.2d 627 (8th Cir 1983); Ely v. Halls Motor Transit Co., 590 F.2d 62 (3rd Cir 1978); Perez v. Dana Corp., 718 F.2d 581 (3rd Cir 1983); Santos v. United Bhd. of Carpenters, 619 F.2d 963 (2nd Cir 1980); Clayton v. UAW, 451 US 679 (1981); McNutt v. Airco, 687 F.2d 539 (1st Cir 1982); Prather v. Neva Paperbacks Inc., 466 F.2d 338 (5th Cir 1971); Lawson v. Truck Drivers LU 100, 698 F.2d 250 (6th Cir 1983), reh & reh en banc den. (1983) cert den 464 US 992 (1983).

The above cases shed some light on the problem of determining exactly when the

Statute of Limitations begins to run in Breach of Contract/DFR suits. This Court needs to determine and clarify this issue as much as possible. When the six months statute begins to run and whether it an issue of material fact that precluded Summary Judgment in the Petitioner's case needs to be reviewed.

II.

When a Trial by Jury is properly demanded in a hybrid Breach of Contract and Breach of the Duty of Fair Representation suit, it should be granted. This Court has already seemingly decided this issue by some of its rulings but the issue of Trial by Jury as a matter of right has not been squarely dealt with.

In Dairy Queen v. Wood , 369 U.S. 469 (U.S. Pa. 1962); Ross v. Bernhard, 396 U.S. 531 (1970); Curtis v. Loether, 415 U.S.189 (1974); Pernell v. Southall Reality , 416 U.S. 363 (1974); Lorilland v. Pons, 434 U.S. 575 (1978), this Court has set guidelines and

rules governing Trial by Jury. While these cases are not all Labor cases, they certainly deal with very similar issues presented at the lower Courts and by this petition to this Court. A decision needs to be made on the issue of Trial by Jury in Breach of Contract and DFR cases. In Ross this Court set out three criteria (1) premerger customs, (2) the nature of the remedy, (3) the practical limitations and abilities of juries. Applying this tripartite standard the Court in Minnis v. U.A.W., 531 F.2d 850 (8th Cir 1975), concluded that the employee was entitled to a Jury Trial in his Fair Representation Action. Ross was not a labor case but it dealt with the same issues now before this Court, Breach of Contract, Breach of Fiduciary relationship, etc. Very similar arguments were used by the Defendants in Ross and the Defendants in this case. The above indicates that the Third Circuit Court of Appeals and District Court has rendered decisions in conflict with decisions of this Court, a higher Court.

There is a conflict between the Circuit Courts on this matter and the Third Circuit seems to have issued conflicting decisions in its own Circuit. In cases Cox v. Masland, 607 F.2d 138 (5th Cir 1979); Minnis v. U.A.W., 531 F.2d 850 (8th Cir 1975); Butler v. Local Union 823, 514 F.2d 442 (8th Cir 1975); Gray v. Insulators Local 51, 416 F.2d 313 (6th Cir 1969); Smith v. Hussman Refrigerator Co., 619 F.2d 1229 (8th Cir 1980) en banc, cert den 449 U.S. 839 (1981); Quinn v. DiGiulian, 739 F.2d 637 (D.C. Cir 1984); the Fifth, Sixth, Eighth ,D.C. Circuits, and possibly this Court decided for Trial by Jury. In cases Brady v. TWA,196 F.Supp 504 (D. Del 1961), aff'd 401 F.2d 87 (3rd Cir. 1968) cert den 393 U.S. 1048 (1969); Nedd v. Thomas, 316 F. Supp. 74 (M.D. Pa. 1970) aff'd, 556 F. 2d 190 (3rd Cir. 1977); Harrison v. Chrysler, 558 F.2d 1273 (7th Cir. 1977); and Atwood v. Pacific Maritime Association, 432 F. Supp 491 (D. Oregon, 1977), aff'd. 657 F.2d 1055 (9th Cir. 1981); the Third, Seventh, Ninth ,and possibly

this Court decided against Trial by Jury in Breach of Contract/DFR cases. In the Third Circuit where this case comes from, Brady and Nedd appear to be in conflict with the decision rendered in Sanford v. O'neill - 616 F.2d 92 (3rd Cir. 1980).

The exercise of sole representation was not foisted on the Defendant Union by the NLRA Act; the Union volunteered to accept that responsibility. That makes it quite different from the Railway Labor Act which imposes the duty on the Railway Unions. In light of the above, whether the Courts can borrow from the F.R.C.P. Rule 81 (A5) poses another question for this Court to decide on. Rule 81 (A5) of F.R.C.P. would indicate deference from N.L.R.B. law to F.R.C.P. rules, which, since Trial by Jury is not mentioned in the Act, indicates rule 38 & 39 of F.R.C.P. apply in Breach of Contract/DFR suits when demanded.

III.

The Third Circuit Court and District Court

abused discretion by resolving factual differences and assuming conslusions of fact, without the benefit of a trial, in favor of the moving parties, by Granting the Defendants Summary Judgment in contradiction to voluminous U.S. Supreme Court and Circuit Court decisions. Also denial of the Motion for Reconsideration added to the injustice done to the Petitioner.

Summary Judgment is considered a drastic remedy by the Courts and this Court has ruled many times concerning Granting Summary Judgment in favor of the moving parties and against the non-movant. It can be considered Hornbook Law that the courts have an obligation to thoroughly scrutinize the records and decide for the non-moving party if anything in the record casts the slightest doubt as to the facts, inferences from the facts, conflicts of assertions, etc. The non-movant is to be given every favorable benefit of the doubt, Summary Judgment may not be granted if genuine issues of material fact

exist, and the burden of proof is on the moving party. Records are to be reviewed in light most favorable to the party opposing the Motion for Summary Judgment. In cases Adickes v. S. H. Kress Co, 398 US 144 (1970); United States v. Diebold , 396 U.S. 654 (1962); Free v. Bland , 396 U.S. 663 (1962); and Poller v. CBS Inc, 368 U.S. 464 (1962); and many others, this Court has consistently supported the rationale stated above. In Adickes v. Kress, this Court cited Poller v. CBS on page 1618 as follows, "it is only when the witnesses are present and subject to cross examination that their credibility and the weight given to their testimony can be appraised...Trial by Affidavit is no substitute for Trial by Jury which so long has been the hallmark of even handed justice".

The Third Circuit Court and the District Court decisions conflict with this Court and other Circuit decisions. The Third Circuit is in conflict with itself on the issue of Summary Judgment. In this case the Third

Circuit affirmed the District Court decision but in Sanford v. O'Neill, 616 F.2d 92 (3rd Cir 1980), the Third Circuit reversed the District Court decision and specifically cited a properly demanded Trial by Jury as one of the reasons for reversal. The Petitioner cited eight Third Circuit decisions in his Brief before that Circuit in support of his case. One Seventh Circuit decision was cited, Parker v. Federal Sat. Mortg. Assc. , 741 F.2d 975 (7th Cir 1984); The Petitioner does not feel the need to belabor this with citations from every Circuit because even a cursory glance through the West's Federal Practice Digests 2nd and 3rd series will reveal hundreds of cases from all the Courts that support the contentions relative to Summary Judgment now placed before this Court by this Petition. It also can be pointed out at this time that when the six month statute of limitations begins to run as surmised by the Petitioner as the reason for granting and affirming Summary Judgment by the District and

Third Circuit Court is an issue of material fact that would preclude Summary Judgment. This was raised at the District Court in the Motion for Reconsideration, see Appendix D & I The District Court and Third Circuit Courts have chosen to ignore the fact that exactly when the six months statute of limitations begins to run is an issue of material fact that would preclude Summary Judgment and Orders handed down by those Courts.

IV.

The Third Circuit Court and the Federal District Courts in Third Circuit apply the most rigid rules in Breach of Contract and DFR suits. This Court must determine what the standard is for Breach of the Duty of Fair Representation (DFR) with no ambiguity to cause confusion or conflict between the Circuits. The Third Circuit and its District Courts have adopted the most rigid of standards in DFR suits. The Third Circuit's

adoption of Amal Assn. of St. Elec Rway. and Mtr. Coach Employees v. Lockridge, 403 US 274(1971), Barzarte v. United Trans Union, 429 F.2d 868 (3rd Cir 1970) and Medlin v. Boeing Vertol Co., 620 F.2d 957 (3rd Cir 1980)for the DFR standards is in conflict with this Courts rulings on more recent cases. This Court in Humphrey v. Moore, 375 US 335 (1964), Vaca v. Sipes, 386 US 171 (1967), Hines v. Anchor Mtr. Freight, 442 US 554 (1976), Faust v. IBEW,442 US 42 (1979), Clayton v. UAW 451 US 675 (1981), Bowen v. USPS, 459 US 212, and Del Costello v. Intl. Bhd. of Teamsters, 462 US 151 (1983) has established an expanded view of the Duty of Fair Representation to include arbitrary, perfunctory, discriminatory, negligent, and bad faith handling of grievances; this view point has been adopted and endorsed by the most recent Supreme Court rulings. The reason for this seems to be that failure to perform basic ministerial duties is the same as no representation at all. This issue

needs clarification by this Court to eliminate the conflict between the Third Circuit and other circuits. The Petitioner believes that this Court's rulings have established this already, but it is apparent that the Defendant Union and the Third Circuit do not agree with this Court's rulings.

V

There exists in the record a genuine issue of material fact with respect to the failure on the part of the Defendants to comply with properly served discovery requests; also, the Defendant's pleadings at the lower courts were improper and substantially unjust to the Petitioner in violation of the Federal Rules of Civil Procedure rules 8(f) and 9 (b). The Defendants failed to comply with properly served Discovery requests which the record shows. They denied the Petitioner acess to records germaine to his argument by denying

knowledge or existence of what was requested. In numerous instances, the Defendant's pleadings were in violation of the FRCP rules 8(f) and 9(b). This was pointed out to the lower courts by the Petitioner, see Appendix J1, J2. Also the very claims made by the Defendants have been ruled on at the Board of Arbitration set up by the Defendants. An Arbitration ruling was rendered over thirty years ago and decided all the contractural claims offered in the Defendant Briefs. The arguments in the Defendant's Briefs were laid to rest over thirty years ago by Sylvester Garrett, the Chairman of the US Steel, USWA Board of Arbitation at the time. It is noted to the Court that Mr. Garrett was the recent mediator during the USX-USWA lockout-strike settlement. The above award has never been challenged and can be found in the Labor Arbitration Reports volume 25 pg. 623 thru 629 (LAR 25-623).

IV

The Union was an active participant in a Breach of Contract against the Petitioner.

The Basic Labor Agreement in the petitioner's case had a tripartite Section of Contract language which made the three parties in this suit participants in a three way contract. The Company, the Union and the employee members are the parties to a specific section of the BLA. It seems rather unique and unusual that this language exists for most contracts do not have this type of language. What this Court has to decide is when this contract language applies to the Union, can they be held accountable for Breach of Contract as well as Breach of DFR. See Appendix at K 3.

CONCLUSION

For the various foregoing reasons, this Petitioner, Pro Se, Brian L. Nicely, respectfully requests that a Writ of Certiorari be granted and issued to review the Judgment of the U.S. Court of Appeals

for the Third Circuit and the Orders of the Federal District Court for the Western District of Pennsylvania.

Respectfully Submitted,

Brian L Nicely

Brian L. Nicely
Petitioner, Pro Se
2607 South 18th Street
Pittsburgh, Pa. 15210
412-481-7980

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 85-3081

BRIAN L. NICELY

Appellant

v.

UNITED STATES STEEL CORPORATION,
a corporation and UNITED STEEL WORKERS
of America, a labor organization

(Civil No. 83-2750 - W.D.Pa. - Pittsburgh)

DISTRICT JUDGE: Honorable Glenn E. Mencer

Submitted Under Third Circuit Rule 12 (6)

February 4, 1987

BEFORE: SEITZ, STAPLETON and MANSMANN, Circuit Judges.

JUDGMENT ORDER

After consideration of the contentions raised by appellant.

It is ADJUDGED AND ORDERED that the

judgment of the district court be and is hereby affirmed. ORDERED that the Union Appellee's motion to dismiss the appeal, etc., is denied as moot.
Costs taxed against appellant.

By the Court,
CIRCUIT JUDGE
/s/ Judge Seitz
ATTEST: Sally Mrvos, clerk
February 5, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIAN L. NICELY,

Plaintiff

v.

UNITED STATES STEEL CORPORATION,
a corporation, and UNITED STATES

STEEL WORKERS OF AMERICA, a labor organization,

Defendants

Civil Action No. 832350

ORDER

And now, this 6th day of August, 1984, upon motion of United Steelworkers of America to Strike Plaintiff's Demand for Jury Trial and being of the view that a fair representation suit may be fairly analogised to a fiduciary action and equitable in nature, not requiring a jury trial under the provisions of the Seventh Amendment (See Atwood v. Pacific Maritime Association), 432 F. Supp. 491 (D.Oregon, 1977), Aff'd 657 F.2d 1055 (9th Cir. 1981).

IT IS ORDERED that the plaintiff's demand for a jury trial is strickened and that the above-captioned case shall be tried

non-jury.

/s/ Glen E Mencer

United States District Judge

cc: James N. Perich, Esq.

Richard J. Brean, Esq.

Jeffrey E. Beeson, Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIAN L. NICELY,

Plaintiff

v.

UNITED STATES STEEL CORPORATION, a corporation, and UNITED STATES STEEL WORKERS OF AMERICA, a labor organization

Defendants

APPENDIX "C1"

ORDER

Defendant United States Steel Corporation's Motion for Summary Judgment is hereby GRANTED this 19th day of December, 1984.

(hand written)

See Del Costello v. International Brotherhood of Teamsters, 461 U.S. 151 (1983); Perez v. Dana Co., 718 F.2d 581 (3rd Cir. 1983); 29 U.S.C. sec. 160 (b). IT IS ORDERED that judgment is entered in favor of the Defendants and against the Plaintiff.

/s/ Glen E Mencer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIAN L. NICELY,

Plaintiff

v.

UNITED STATES STEEL CORPORATION, a corporation, and UNITED STATES STEEL WORKERS OF AMERICA, a labor organization,

Defendants

Civil Action No. 83- 2750

ORDER

The Court having considered the evidence and arguements submitted in connection with Union Defendant's Motion for Summary Judgment and it appearing that there is no dispute as to any material fact. IT IS HEREBY ORDERED that Union Defendant's Motion for Summary Judgment is GRANTED,

(hand written)

Also See: Del Costello v. International Brotherhood of Teamsters, 461 U.S. 151 (1983); Perez v. Dana Co., 718 F.2d 581 (3rd Cir. 1983); 29 U.S.C. sec. 160 (b). IT IS

ORDERED that judgment is entered in favor of the Defendants and against the Plaintiff.

/s/ Glen E Mencer
United States District Judge
December 19, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIAN L. NICELY,
Plaintiff
v.
UNITED STATES STEEL CORPORATION, a corporation, and UNITED STATES STEEL WORKERS OF AMERICA, a labor organization,
Defendants
Civil Action No. 83-2750

Order

AND NOW, this 9th day of January, 1985, IT IS HEREBY ORDERED that the Motion for

Reconsideration of Orders of Court Granting Defendant's Motion for Summary Judgment filed by Plaintiff Brian L. Nicely, is DENIED.

/s/ Glen E Mencer
United States District Judge

cc: James N. Perich, Esq.
Richard J. Brean, Esq.
Jeffrey E. Beeson, Esq.

IN THE SUPREME COURT OF THE UNITED STATES

No. A-806

BRIAN L. NICELY,

Applicant

v.

UNITED STATES STEEL CORPORATION, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

APPENDIX "E"

UPON CONSIDERATION of the application of counsel for the applicant. IT IS ORDERED that the time for filing a petition for writ of certiorari in the aboveentitled cause be, and the same is hereby extended to and including June 5, 1987.

/s/ William J. Brennen, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 6th day of May, 1987.

STATUTES

28 Sect. 1291. Final decisions of district courts from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 Sect. 1337. Commerce and anti-trust regulations- The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulalion commerce of protecting trade and commerce against restraints and monopolies.

28 Sect. 2072. Rules of civil procedure- The Supreme Court shall have the power to prescribe by general ruless, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of

the United States in civil actions, including admiralty and maritime cases, land appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United Statesand for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by t he Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this

title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

29 Sect. 151. Findings and declaration of policy- The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrunentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as

substantially to impair or disruptthe market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stablization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices

fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and

eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workersof full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 Sect. 159. Representatives and elections-Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any

individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representatives has been given opportunity to be present at such adjustment.

29 Sect. 160. Prevention of unfair labor practices- Powers of Board generally- Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent oragency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and contaiing a notice of hearing before the Board or a member thereof, or before a

designated agent or agency, at a place therein fixed not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or in the Board in its discretion at any time prior to the issuance of an order based thereon. Theperson so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency

conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

29 Sect. 185. Suits by and against labor organizations venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce is defined in this chapter or between any such labor organizations may be brought in any District Court of the United States having jurisdiction of the parties without respect to the amount in controversy of without regard to the

citizenship of the parties. Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor

organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency:

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts,

the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

BRIAN L. NICELY,

Plaintiff,

v.

UNITED STATES STEEL CORP.,
a corporation, and UNITED STEELWORKERS
OF AMERICA, a labor organization

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANT UNION'S AND DEFENDANT COMPANY'S MOTIONS FOR SUMMARY JUDGMENT

AND NOW comes Plaintiff, BRIAN L. NICELY, by his attorney, JAMES N. PERICH, and responds to the Motions for Summary Judgment filed on behalf of Defendant UNITED STATES STEEL CORPORATION and Defendant UNITED STEELWORKERS OF AMERICA, as follows:

On page five (5) of its Motion, Defendant Company has gratutiously undertaken to

advance arguments on behalf of Defendant Union, and for purposes of this Pleading, SectionB of Defendant Company's Argument will be disregarded.

Both Defendants have asked this Court for Summary Judgments to be granted in their favor without submitting the easiest and most obvious evidence to support their positions; namely, records, affidavits, or other adlmissible evidence which would tend to prove that furloughs and recalls of Apprentice and Journeymen "Trade and Craft Employees" (such as Welders) were handled in the manner which Defendants

(Footnote)

Due to the interrelationships surrounding the circumstances of this case, Plaintiff is responding with one Pleading to the Motions of both Defendants.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIAN L, NICELY

Plaintiff,

v.

UNITED STATES STEEL CORPORATION
a corporation, and UNITED STEELWORKERS
OF AMERICA, a Labor Organization

Defendants.

DEFENDANT UNITED STATES STEEL CORPORATION'S REPLY TO PLAINTIFF'S RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT

In his response to Defendant's Motions for Summary Judgment, Nicely presented numerous facts in the form of affidavits and exhibits--very few of which are material to the legal issues dispositive of his claim. This Reply Brief will briefly recap the legal issues before the Court and place Nicely's response in that context. To suceed in his claim, and to defeat summary judgment, Nicely

must raise material issues of disputed facts with respect to two questions:

(1) Whether the USW breached its duty of fair representation; and

(2) Whether USS breached 613-A of the basic labor agreement ("BLA").

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIAN L. NICELY

Plaintiff,

v.

UNITED STATES STEEL CORP.

a corporation, and

UNITED STEELWORKERS OF AMERICA,

a labor organization,

Defendants

Civil Action No. 83-2750

Judge Glenn E. Mencer

APPENDIX "H2"

UNION DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

This case ended with the filing of Plaintiff's Response to Defendant Union's and Defendant Company's Motion For Summary Judgment and supporting Affidavit of Plaintiff. This is so because under Plaintiff's own version of the facts, as set in these documents, it is clear that this hybrid action for breach of the duty of fair representation against the Union and breach of the collective bargaining agreement against the Company is barred by the six month limitations period of Sect 1 (b) of the National Labor Relations Act, 29 U.S.C. Sect 160(b). See: DelCostello v. International Brotherhood of Teamsters, ____U.S.____

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIAN L. NICELY

Plaintiff,

v.

UNITED STATES STEEL CORP.

a corporation, and

UNITED STEELWORKERS OF AMERICA,

a Labor organization

Defendants

Civil Action No. 83-2750

Judge Glenn E. Mencer

PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDERS OF COURT GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, BRIAN L. NICELY, hereby moves this Court for reconsideration of its Order dated 12/19/84, wherein it granted Defendant's Motion For Summary Judgment for the following reasons:

1. The cases land statute cited by the

Court in its Orders presumably indicates that the Court's decision is based upon the assumption that Plaintiff's claim against Defendant Union arose on March 23, 1983. Union Defendant has suggested to the Court, on Page 3 of its Reply Memorandum that Plaintiff has raised this claim for the first time in his Response to Defendant's Motions. A careful reading of the pleadings, especially Paragraph 30 of Plaintiff's Complaint, reveals that Plaintiff's claim againstthe Union has always been based upon its failure to prosecute his grievance to arbitration when it was obligatedto do so for reasons set forth in the pleadings. Plaintiff's grievance was withdrawn in May, 1983.

2. The issue of when Plaintiff's claim vis-a-vis the Union is, in itself, one of a material fact which should preclude Summary Judgment. Further, the issue of timeliness was never addressed in Plaintiff's grievance procedure because Defendant Union withdrew

the grievance before arbitration.

Vaca v. Sipes 386 US 171, 875 Ct. 903 (1967), Czosek v. O'Mara 397 US 90 S.Ct. 770 (1970), Hines v. Anchor Motor Freight Inc. 424 1US 554, 96 S.Ct. 1048 (1976), Clayton v. I.U.A.A.A. I.W. 451 US 679, 101 S.Ct. 2088 (1981), Milstead v. Int'll 1Bhd. Teamsters, L.U. 957 11580 F2d 232 111(6th Cir Ohio), Minnis v. UAW 531 F2d 850 (8th Cir 1975), Richardson v. C.W.A, 443 F2d 974 98th Cir 1971 Dutrisac v. Catapillar Tractor Co., 113 LRRM 3532 (9th Cir 1983).

The other group of issues discussed on the first page of this argument will be lumped together here for the purposes of expedience land hopefully some sense can be made of them in light of the Appellant's ignorance of the proper way to write legal briefs.

Violations of FRCP rules occurred as stated on pgs. 5 thru 9 in the Appendix.

Pleadings were not construed to do substantial justice. They have been deliberately plead in order to do harm by making misrepresentations, inferences, and false statements. Averments inconsistent with the facts were made at pgs. 375 thru 378 of the Appendix. Ammended briefs should be filed to correct all the errors. The possibility of extrajudicial procedure was not even explored (the Appellant doubts if it can be at this point). Proper discovery was not done because many facts, documents and records requested (see App. pgs. 34, 35, 39, 40, 226 thru 229, 232 thru 237) were never submitted to the Plaintiff. The Plaintiff's own personnel file was never submitted. Records in App.pgs. 228, 229, were never received by the Plaintiff or Court as record shows. This in itself was and is reason to deny Summary Judgment and remand for proper Discovery. Deft. U.S.S. submitted altered or incorrect documents relative to the work records of Welders, see App. 327,

328 as compared to pg. 38 & 39. These documents were to reflect dates of layoff and recall from 1976 or prior and do not. Jenkins, DeBernardo, Miller, and Shaffer's records do not show layoff or recall and the dates requested, other records at pgs. 327, 328 also do not reflect back to 1976.Sanctions were filed but not enforced. Many of the records the Sanctions were to produce were either not given, ignored, erroneous, or incomplete. Trial by Jury was refused. Summary Judgment was granted. The issues in the Motion for Reconsideration were ignored by the District Court (see App. pg. 473, 474). Many of the improprieties by the Defendants as ommissions, misrepresentations, etc., can only be construed as deliberate. These are a few of the F.R.C.P. rules that were violated (see App. pgs. 5 thru 9.).

There were many inconsistencies relative to the facts in this case. These were done by the Defts.The alleged practice, statements about the correct reading of BLA and LSA,

refusing to address the JDC manual, refusal to address the Arbitration Awards are just some of the inconsistencies. Union Deft.'s claim of a false reading relative to a practice at pg. 466 cannot hold against documents at pgs. 182 thru 194, 325, 372 thru 384 of the Appendix. The claim of timeliness being raised for the first time (pg. 391 thru 453 in App.) by the Defendant, is also false. Deft. made this claim on pgs. 455 and 463 of the App. in their replies. A reading of App. pgs. 254 thru 269, 199 & 370 (see note on bottom of pg. 199), see pg. 11 Docket Entry #10 & 11 for dates, App. pg. 199 & 370 shows that timeliness was not hidden and it was at the heart of any litigation that ensued. Clifford was told this in a meeting on March 21, 1983 two days prior to his appealing EET-82-49 to Arbitration. Even if a Statute of Limitations claim was raised for the first time, it is a matter of law that positions and briefs can be ammended and changed. The Deft. U.S.S. claims that the

Plaintiff is asking the Courts to rewrite the contract to the Plaintiff's liking (see App. pg. 363) is wrong. Deft. U.S.S. claim that the Plaintiff is lumping all Welders together is wrong, (see App. pgs. 362, 363). At pg. 462 in the Appendix, Deft. U.S.W.A.' s claim about Plaintiff causing chaos to the seniority system is false. At pg. 466 in the Appendix, Deft. U.S.W.A.'s claim that Plaintiff slept on his right, etc. is wrong. At pgs. 370, 377, 380, 458 of the Appendix claims made by Defendants. are clearly misrepresentations and inconsistent with the facts.

An employee assigned as a temporary foreman will not issue discipline to employees, provided that this provision will not prevent a temporary foreman from relieving an employee from work for the balance of the turn for alleged misconduct. An employee

will not be called by either party in the grievance procedure or arbitration to testify as a witness regarding any events involving discipline which occurred while the employee was assigned as a temporary foreman.

SECTION 2B --LOCAL WORKING CONDITIONS

The term " local working conditions" as used herein means specific practices or customs which reflect detailed application of the subject matter within the scope of wages, hours of work, or other conditions of employment and includes local agreements, written or oral on such matters. It is recognized that it is impracticable to set forth in this Agreement all of these working conditions, which are of a local nature only, or to state specifically in this Agreement which of these matters should be changed or eliminated. The following provisions provide general principles and procedures which explain the status of

these matters and furnish necessary guide posts for the parties hereto and the Board.

1. It is recognized that an employee does not have the right to have a local working condition established, in any given situation or plant where such condition has not existed, during the term of this Agreement or to have an existing local working condition changed or eliminated, except to the extent necessary to require the application of a specific provision of this Agreement.

2. In no case shall local working conditions be effective to deprive any employee of rights under this Agreement. Should any employee believe that a local working condition is depriving him of the benefits of this Agreement, he shall have recourse to the complaint and grievance procedure and arbitration, if necessary, to require that the local working condition be changed or eliminated to provide the benefits established by this Agreement.

3. Should there by any local working conditions in effect which provide benefits that are in excess of or in addition to the benefits established by this Agreement, they shall remain in effect for the term of this Agreement, except as they are changed or eliminated by mutual agreement or in accordance with paragraph 4 below.

4. The Company shall have the right to change or eliminate any local working condition if, as the result of action taken by Management under Section 3 Management, the basis for the existence of the local working condition is changed or eliminated, thereby making it unnecessary to continue such local working condition; provided, however, that when such a change or elimination is made by the Company any affected employee shall have recourse to the complaint and grievance procedure and arbitration, if necessary, to have the Company justify its action.

5. No local working condition shall hereafter be established or agreed to which

changes or modifies any of the provisions of this Agreement, except as it is approved in writing by an International Officer of the Union and the Personnel Services Executive of the Company.

6. The settlement of a grievance prior to arbritration under this Sect. 2-B shall not constitute a precedent in the settlement of grievances in other situations in this area.